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No. 95-582

In The Supreme Court of the United States
October Term, 1995

EUGENE JAMES MUSTIN,

Petitioner,

v.

PAMELA WITHROW,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

WERE PETITIONER'S HABEAS CLAIMS RAISED FOR THE FIRST TIME ON APPEAL BROUGHT PROPERLY BEFORE, AND CONSIDERED BY OR RULED UPON, THE SIXTH CIRCUIT COURT OF APPEALS?

WAS THERE SUFFICIENT EVIDENCE PRESENTED AT PETITIONER'S JURY TRIAL TO SUPPORT HIS CONVICTION OF SECOND DEGREE MURDER?

TABLE OF CONTENTS

Pages

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 1

STATEMENT OF FACTS 2

REASONS FOR DENYING THE WRIT 18

THE PETITION PRESENTS NO IMPORTANT UNSETTLED QUESTION OF FEDERAL LAW AND THE DECISION BELOW DOES NOT CONFLICT WITH DECISIONS OF THIS COURT OR OTHER UNITED STATES COURTS OF APPEALS 18

PETITIONER'S HABEAS CLAIMS RAISED FOR THE FIRST TIME ON APPEAL WERE NOT PROPERLY BEFORE, AND WERE NOT CONSIDERED BY OR RULED UPON BY, THE SIXTH CIRCUIT COURT OF APPEALS 19

SUFFICIENT EVIDENCE WAS PRESENTED AT PETITIONER'S JURY TRIAL TO SUPPORT HIS CONVICTION OF SECOND DEGREE MURDER 20

RELIEF SOUGHT 25

TABLE OF AUTHORITIES

Pages

Cases

Brown v. Davis, 752 F.2d 1142 (6th Cir. 1985) 20

Brown v. Marshall, 704 F.2d 333 (6th Cir. 1983), cert. den. 464 U.S. 835 (1983) 19

Fuller v. Anderson, 662 F.2d 420 (6th Cir. 1981), cert. den. 455 U.S. 1028 (1982) 20

Jackson v. Virginia, 443 U.S. 307 (1979) 20

People v. Flowers, 191 Mich. App. 169; 477 NW.2d 473 (1991), lv. den. 439 Mich. 953 (1992) 21

Picard v. Connor, 404 U.S. 270 (1971) 19

People v. Smith, 148 Mich. App. 16; 384 NW.2d 68 (1985) 20

Singleton v. Wulff, 428 U.S. 106 (1976) 19

Other Authorities

28 U.S.C. 2254(b) 19

M.C.L. 750.317; M.S.A. 28.549 1,12,20

M.C.L. 767.39; M.S.A. 28.979 20,22

STATEMENT OF THE CASE

Petitioner Eugene James Mustin, (Petitioner), who is incarcerated at a Michigan penal institution by virtue of a Michigan sentence for Petitioner's imprisonment for 20 to 60 years for his conviction of second degree murder, M.C.L. 750.317; M.S.A. 28.549, is seeking a writ of certiorari from the January 18, 1995 decision of the Sixth Circuit Court of Appeals, which affirmed the judgment of the district court dismissing Petitioner's habeas petition, and held:

1. Petitioner's issues involving an alleged trial court order suppressing evidence of the vandalism of the automobiles of the murder victim and his companions, and the redacted statement of a co-defendant were not properly before the court for review; and,

2. The evidence adduced at Petitioner's trial was sufficient, when viewed in the light most favorable to the prosecution, to support Petitioner's conviction of second degree murder as the Michigan Court of Appeals and the District Court held.

Petitioner's petition contains a question and two arguments, IV and II, on the redacted statement of a co-defendant issue that the Sixth Circuit Court of Appeals held was not properly before the Court for review. Petitioner's arguments II and III in his petition are partially or completely directed to the alleged trial court order suppressing vandalism evidence issue that the Sixth Circuit Court of Appeals held was not properly before the Court for review.

The only issues properly before this Court are whether Petitioner's alleged trial court order suppressing evidence of vandalism and redacted statement issues were properly before the Sixth Circuit Court of Appeals, and whether the evidence adduced at Petitioner's trial was sufficient to support his conviction of second degree murder.

STATEMENT OF FACTS

Petitioner's petition does not contain a statement of facts. Respondent, therefore, submits the following statement of facts:

The facts of the crime that Petitioner was convicted of were summarized by the Court of Appeals in the decision in the consolidated appeal of Petitioner (People v. Mustin, Michigan Court of Appeals file number 116199); co-defendant Harry L. Houston, Jr., (People v. Houston, Michigan Court of Appeals file number 118929); and, co-defendant Robert Louis Chatman (People v. Chatman, Michigan Court of Appeals file number 120544), as follows:

> At approximately 2:30 a.m. on September 4, 1988, the victim and five male friends were playing basketball at a park. Before they began to play, they noticed defendants' blue Ford automobile drive past. About an hour later, they discovered that their automobiles had been vandalized and at least two members of the group saw defendants' Ford leaving the scene. When defendants' Ford returned, the victim and his friends armed themselves with tools from their vehicles' trunks, and one person struck defendants' Ford with a pair of bolt cutters as it drove past. Defendants circled the block, parked and turned out the Ford's headlights, then got out of the car. All of the basketball players except the victim fled to a nearby drugstore where one of them telephoned the police.
>
> After his companions fled, the victim met a man on a bicycle named Titus and told him what had happened. When the players and the police returned [to] the scene, they discovered that Titus had been beaten and was incoherent. At the same time, defendants reappeared at the scene in a different automobile and, upon being identified by the players, fled on foot with the police and at

> least one of the players in pursuit. Defendants were apprehended shortly thereafter. The victim was found a short distance from Titus and soon died. The victim had been beaten to death with a chain.
>
> Titus testified at trial that he had heard a cry for help and had pedaled toward the players'vehicles. When Titus reached the automobiles, the defendants stepped out from behind the automobiles and defendant Houston began to strike Titus in the face with his fist. At the same time, Mustin and Chatman chased and eventually brought down the victim. Houston took a bicycle chain and lock from Titus after striking him four to six times, then walked over to Mustin, Chatman, and the victim. Titus observed Houston and Chatman begin to beat the victim with the chain. After Houston arrived, Mustin did not take part in the beating, but stood by and watched. (R 30; pp 1-2)

The vandalism of the basketball players' automobiles was part of the res gestae of the assault upon Jason Titus with intent to do great bodily harm less than murder, and the second degree murder of Brian Toureau. Petitioner has asserted in his petition:

> Although a motion to suppress was filed in Mr. Mustin's behalf and the trial court ordered that no reference to the alleged vandalism of the automobiles of the six (6) white youths' automobiles be made during the course of trial, the People consistently referred to the alleged vandalism. (Petition pp 14-15)

Petitioner, however, has not stated the date the alleged motion was filed or heard. Nor has Petitioner cited a transcript page containing the alleged ruling on this alleged motion. Petitioner's counsel objected to the prosecutor making any statement connecting the defendants with

vandalism in his opening argument, because they were not charged with vandalism and the factor of foundation and relevancy. (R 19; pp 30-32) No mention of Petitioner's alleged motion to suppress or alleged suppression ruling was made. In addition, co-defendant Chatman's trial counsel referred to the vandalism in his opening statement (R 19; pp 53-54), and extensively cross-examined the first police witness, who saw the basketball players' cars, about the vandalism (R 20; pp 145-153). Thus, the existence of Petitioner's alleged motion to suppress and alleged ruling thereon are not supported by the record.

On September 3, 1988, at approximately 9:30 p.m. Petitioner borrowed his mother's blue Ford Taurus to go to the movies with Robert Chatman and Harry L. Houston, Jr. Mrs. Mustin next saw the car at 3:00 a.m. parked near her home with three small scratches at the bottom of the driver's door. (R 24; Bobby Mustin [BM] pp 175-178, 184-187)

Sometime after 2:00 a.m. on September 14, 1988, Ronald Masters and Brian Toureau, the murder victim, drove their automobiles to Macomb Gardens Park to play basketball with friends. At approximately 2:30 a.m., they parked their cars in an area of Macomb Gardens Park (R 21; Ronald Masters [RM] pp 155-157), which would shortly thereafter become the scene of vandalism of the parked vehicles, an assault on Jason Titus with intent to do great bodily harm less than murder, and the murder of Brian Toureau.

The area was described as a well-lighted area with two street lights. There were three or four street lights along an alley, Service Drive, and the businesses in the area had exterior lights on, including the Chrysler-Plymouth dealer, which had flood lights, a recreational vehicle center, and The Ritz. There were also lights at the basketball courts and in the park. (R 20; James Edwards [JE] p 14, R 21; JE pp 39-49, R 21; Peter Flaton [PF] p 61)

Ronald Masters stayed by his car to change clothes, and Brian Toureau went to the basketball courts to play basketball while Masters was changing his clothes. Petitioner and his two companions, Chatman and Houston,

drove up in the blue Taurus and one of them whistled at Masters who had extremely long hair. Masters walked up to the Taurus and told Petitioner and his companions he wasn't a girl and asked whether they wanted to play basketball. Petitioner and his companions said no and drove off. (R 21; RM pp 155-159)

Masters joined his friends and they played basketball until they heard a car alarm. Masters and his friends continued to play basketball, assuming some other friends had arrived and had jerked Joe Neiporte's car to set the alarm off. However, when the alarm went off again, and they heard a crashing noise, they ran to their cars and found slashed tires and broken windows on their vehicles. (R 23; Gene Catallo [GC] p 39, R 23; Joe Neiporte [JN] p 83, R 21; RM pp 160-162)

Joe Neiporte observed a late model Ford, similar to the Sable he rented a month earlier, pulling away from the vandalism scene as he ran to his car. (R 23; JN pp 83-84; 93-95)

James Paluzzio saw the blue Taurus leaving the vandalism scene, driving around in the area, and returning to the vandalism scene at a low rate of speed. (R 22; James Paluzzio [JP] pp 47-51)

When the basketball players became aware that the blue Taurus was returning, some of them armed themselves with jack handles and tools from the trunk of Brian Toureau's car to protect themselves and ducked behind their vandalized vehicles. (R 21; RM pp 162-163, 166-185, 208, R 22; RM pp 21-23) James Paluzzio threw his own bolt cutter at the blue Taurus as it passed the vandalized vehicles to keep its occupants from getting out of the vehicle. (R 22; JP pp 50-51, 69) Ronald Masters laid the jack, which was later found by Brian Toureau's body, on Toureau's car, (R 21; RM pp 227-228), and ran after the car to determine its license plate number. (R 21; RM pp 167-168, 185-186, R 22; RM p 26) The blue Taurus started back to the scene and its occupants got out of the vehicle, (R 21; RM p 169, R 22; RM p 23), which resulted in all of the basketball players, except Brian Toureau, leaving the area and later meeting at a Perry

drugstore. (R 21; RM pp 170-172)

Jason Titus was riding his ten-speed bicycle in the area of Macomb Gardens Park in the early morning hours of September 4, 1988, looking for cans and bottles. (R 23; Jason Titus [JT] p 148) He heard a call for help and went to render aid. (R 23; JT p 163) He rode down the service drive and observed Brian Toureau walking towards him but continued to ride by. He noticed nothing in the hands of Mr. Toureau. (R 23; JT p 205, R 24; JT p 42) He saw some other people down the street and saw the damaged vehicles in the parking lot. (R 23; JT p 150) There was glass all over, and as he rode near the van, co-defendant Harry L. Houston, Jr., (Houston), jumped out from the front of the van and two black males came out from the rear of the van. Mr. Titus was accosted, grabbed, and then punched by Houston who had come from the front of the van. Houston grabbed a bicycle lock and chain which Mr. Titus had wrapped around his body, with one hand and punched Mr. Titus four or five times in the face until Mr. Titus let go of the chain. (R 23; JT pp 151-155)

While Houston was beating Mr. Titus, the two black males who had run out from behind the van ran after Brian Toureau. (R 24; p 42) He heard a yell or scream come from down the street. (R 23; JT pp 209-210) Over by the fence, he saw Brian Toureau being dragged to the ground by one of the black males, while the second black male, Petitioner, was present. (R 24; JT p 30) The other man beat Brian Toureau. (R 23; JT pp 157, 188) Petitioner stood by and watched the beating. (R 24; JT pp 22-23) As soon as Mr. Titus surrendered the chain, Houston walked away from him and across the street and began beating Mr. Toureau over the head with the chain and lock. (R 23; JT pp 155-158, R 24; JT pp 9-10) Three black males were present by Brian Toureau while he was being beaten but only two, Houston and the other man, were engaged in the beating. (R 24; JT pp 31-33) Although the beating Titus received caused his peripheral vision to be cloudy, he could see well directly in front of him. (R 23; JT pp 215-217, 221, R 24; JT p 14)

Mr. Titus was hospitalized for one week due to the beating. He had lacerations to his face, his face was

swollen, and his lip was cut. (R 23; JT pp 155, 166) Mr. Titus was unconscious in the hospital from Sunday until he regained consciousness on Friday. (R 23; JT pp 192-193) Mr. Titus identified a chain and lock as the items taken from him. His identification was based on similarity of appearance and the fact that his key opened the lock on the chain. (R 23; JT p 190)

Ronald Masters went back to the park to find Brian Toureau. He arrived at the crime scene, shortly before a police vehicle arrived with the other basketball players from the Perry drugstore, and found Jason Titus. A red Daytona was coming down Church Street with Chatman and Houston on the front fenders. Petitioner was in the automobile, which stopped and Petitioner and his companions ran off. (R 21; RM pp 172-175)

Joe Neiporte found a badly beaten Brian Toureau. Brian Toureau had no pulse and was taken away by medics. Later, Masters, Paluzzio, and Cardonna found more damage had been done to the vehicles after they left the crime scene to go to the Perry Drug Store. (R 21; RM pp 174-177, 233-234, R 22; JP pp 64-65, 99-100, R 22; MC pp 237-238, R 23; JN pp 89-90, 122, 125)

Brian Toureau was found at fence post twelve of the six-foot high cyclone fence surrounding Macomb Gardens Park, laying against the fence, approximately 125 to 150 feet from where Jason Titus was found beaten, and an automobile bumper jack was found next to his head. The fence area at fence post twelve was visible from where Titus was found and light reflected off the fence. (R 20; JE pp 54-57, 93, 95, 100-102, 107-109, R 21; JE pp 39-49, R 21; Peter Flaton [PF] pp 62-64, 72-74, 86-87, 91-92, 150, R 23; Michael Cardonna [MC] p 34, R 23; Gene Catallo [GC] pp 43-44, 90) There was hair on the bumper jack. (R 22; Kevin Vergauiser pp 211-215, R 22; Jerome Urbaniak pp 113, 203-205)

Doctor Werner Spitz, a pathologist, performed an autopsy on the body of Brian Toureau at Martha T. Berry Hospital on September 4, 1988. (R 20; Werner Spitz [WS] p 173) The examination of the body revealed patterned

scrapes and patterned abrasions over the forehead and above the eyes, an open fracture of the right leg, and a three-inch gaping laceration of the left backside of the head. (R 20; WS pp 174-175) There were patterned bruises and scrapes on the back of the left shoulder, the back of the left thigh, and the back of the right leg, which caused the shin bone to break and stick out the front of Brian Toureau's right leg. (R 20; pp 177-178) There were other bruises on the right flank. There were six or seven individual patterned injuries. (R 20; WS p 175) The three-inch gaping laceration to the head had a depressed fracture of the skull underneath. The skull bone was broken and pushed inward. (R 20; p 176) Dr. Spitz stated a patterned injury is caused by a known type of trauma or caused by the implement which strikes the body, imprinting itself on the skin. (R 20; WS pp 176-177) The pattern he observed was the pattern of chain links. (R 20; WS p 177) This chain link pattern was on the back of the right leg opposite the front leg area where the bone was fractured. (R 20; WS p 177) There were two chain patterns on the back of the left shoulder, two imprints on the back of the left thigh, one imprint on the back of the right leg and one imprint across the forehead. (R 20; WS p 182) The cause of death was the head injury caused by a beating. (R 20; WS pp 178, 185) The patterns observed were caused by a chain such as the one found near the scene or one like it. (R 20; WS p 184) The head injury could have been caused by the chain and a penetrating object such as the lock or the jack. (R 20; WS pp 184-185, 187, 190) It is possible that the penetrating object was the lock which was attached to the chain. (R 20; WS pp 185, 203)

Police Officer Albert Burke stopped Petitioner one block from Macomb Gardens, Petitioner's shirt was torn and hanging open, he had a scrape on his side, he was disheveled and had a blister and puncture on his left palm. (R 24; Albert Burke [AB] pp 57-61)

Houston was apprehended by Police Officer Michael Lauretti running in a nearby street. (R 23; Michael Lauretti p 7)

Detective Richard Sparks, after a meeting with Mrs. Mustin, went with other officers to Chatman' home and

arrested him at approximately 8:00 a.m. On September 4, 1988, Chatman was taken to the Roseville Police Department and given his constitutional rights at approximately 10:55 a.m. Thereafter, Detective Sparks and Sergeant Gabriel interviewed him briefly and placed him in a cell. Chatman's mother visited him. (R 25; Richard Sparks [RS] pp 66-69)

Detective Sparks and Sergeant Gabriel interviewed Chatman again with his mother present and Chatman gave them a statement. (R 25; RS p 72, R 25; Sergeant Richard Gabriel [RG] p 117)

Petitioner filed a pretrial motion in limine concerning the statement of Chatman. On April 5, 1989, Petitioner's motion was discussed with the trial court during jury selection. The trial court, however, declined to consider the motion until a jury was selected (R 18; pp 188-197) On April 6, 1989, after the jury was selected and prior to opening statements, Petitioner's motion in limine was again raised. The prosecutor stated that Chatman's statement would be redacted to remove all references to Petitioner and Houston and that Chatman would be the only person implicated by his statement. (R 19; pp 5-13)

On April 17, 1989, Petitioner's motion in limine was again argued and a special record made of the testimony concerning Chatman's redacted statement. (R 25; pp 18-62) The trial court, after hearing the redacted statement, was surprised that Petitioner and Houston were trying to keep it out and ruled that the police officers could testify as to Chatman's redacted statement, but had to be sure that the other two defendants were not in any way implicated. (R 25; pp 44, 60-62) Petitioner's counsel requested that Chatman's statement be altered and that the police officers testify that Chatman stated he beat Brian Toureau with the bumper jack instead of the chain and lock. (R 25; p 45) The trial court refused to direct the police officers to lie. (R 25; pp 46-47)

Detective Sparks and Sergeant Gabriel testified that Chatman made the following statement:

On September 4, 1988, Chatman drove up to the area where the basketball players' cars were parked and saw a man with long blond hair who Chatman thought was a girl. Chatman whistled at the person and said "Hey baby" or something of that nature. The man asked Chatman if he wanted to play basketball and Chatman told him no. (R 25; RG p 118)

Chatman drove back to the area approximately one-half hour later and observed the basketball players' cars were vandalized. Someone threw something at the car, and Chatman turned around and came back to Macomb Gardens Park. Chatman saw someone with a jack yelling at him and got out of the car and approached the man. (R 25; RG p 119, R 25; p 72)

The man swung the jack at Chatman, dropped the jack and ran away. Chatman chased after the man down in Service Drive and caught him by a fence. Chatman struck the man six or seven times with a chain and lock and threw the lock and chain in a field. (R 25; RG pp 119-122, 164, 175-177, R 25; RG pp 72-74, 89, 100, R 26; RG p 57)

Chatman subsequently saw a friend and was driven back to Macomb Gardens Park on the front of his friend's car. Chatman jumped off the car and ran home when he saw the police. (R 25; RG pp 73-74, 85, R 25; RG p 121)

Jason Titus' chain and lock were found in a sewer, after the police received a tip. (R 25; RG pp 140-141, 125-130)

The prosecutor rested after Sergeant Gabriel's testimony, and the defendants moved to dismiss. (R 25; pp 188-209) The trial court denied the motion. (R 25; pp 209-211) The following day, Petitioner argued a motion for directed verdict (R 26; pp 4-27), which was also denied. (R 26; pp 27-32)

Of the three co-defendants, only Houston testified. He stated that he was a passenger in a car driven by Mustin at about 2:35 a.m. on September 4, 1988. They were driving north on Macomb and saw the vandalized cars, but he

claimed they had nothing to do with the vandalism. (R 26; Harry Houston [HH] pp 70, 86) They drove back and someone threw an object at their car. (R 26; HH p 72) They went into a lot, backed up and parked. They were going back to investigate why an object was thrown at the car. (R 26; HH p 72) Houston had stopped at a friend's house to get some help but no one answered. He heard someone yell and ran to join the other defendants. (R 26; HH p 74) He saw a "big guy" with a car jack swing the jack at Chatman. (R 26; HH pp 74-75) Another person was in the area of Toureau, Chatman and Mustin and grabbed at Mustin. (R 26; HH p 75) This second person, Titus, had a chain and lock around his neck which Houston took away so he would not be hit with it. (R 26; HH p 76) Houston admitted hitting the man on the bike about four times until able to take the chain from the man and then he threw the chain into a field. (R 26; HH pp 76-77) He stated he was unaware of anybody other than Mr. Titus being injured. (R 26; HH p 80) On cross-examination, Houston stated that at the time of the confrontation he was six feet two inches and weighed 250 pounds. (R 26; HH p 81) The defendants had gone to a movie in the blue Taurus. When they went to get something to eat, they saw a blond guy who invited them to play basketball. (R 26; HH pp 82-83) Houston denied giving Chatman the chain and lock. (R 26; HH pp 108, 133) He stated that when he was fighting with Titus he heard some scuffling but did not know what was happening. (R 26; HH pp 129, 134)

On April 19, 1989, after going over the instruction in chambers, Petitioner's counsel said he saw no reasonable objection (R 27; p 6) and thereafter closing arguments were made.

On April 20, 1989, the trial court instructed the jury. A specific instruction concerning Chatman's statement was given. (R 28; p 13) The trial court instructed the jury on the elements of second degree murder and that each was charged as committing second degree murder or aiding or assisting another in the commission of the crime and gave the elements of aiding and assisting. (R 28; pp 13-17)

The jury was instructed on self-defense and each defendant's theory of the case. (R 28; pp 22-23) The jury later found Petitioner guilty of the second degree murder of Brian Toureau. (R 28; pp 52-55)

On May 22, 1989, a judgment of sentence was entered by the trial court sentencing Petitioner to 20 to 60 years for second degree murder, M.C.L. 750.317; M.S.A. 28.549.

On June 4, 1994, the Michigan Court of Appeals issued a decision in the consolidated appeal of Petitioner and his two co-defendants, People v. Mustin, et al, Michigan Court of Appeals file number(s) 116199/118929/120544, which provides in pertinent part:

> Mustin raises three issues on appeal. Mustin first claims that the trial court erred when it failed to grant his motion to dismiss, brought at the close of the prosecutor's opening statement.
>
> * * *
>
> Mustin next claims generally that the trial judge was biased against him. Defendant appears to equate the trial judge's denial of his motion for a directed verdict with bias and argues that "[t]he reasons advanced by the court for not granting Defendant's Motion and permitting the case against Mr. Mustin to go to the jury indicate how completely the court accepted the innuendoes and assumption of the facts advanced by the prosecutor. . . ."
>
> * * *
>
> Finally, although the issue is not clearly argued, Mustin implies that the trial court erred as a matter of law when it denied his motion for a directed verdict. In reviewing the trial court's denial of defendant's motion, we will examine the evidence presented

during the prosecutor's case, view that evidence in a light most favorable to the prosecutor, and determine whether a rational trier of fact could have found that he (sic) essential elements of the crime were proven beyond a reasonable doubt. People v Hampton, 407 Mich App 354, 368; 285 NW2d 284 (1979), cert den 449 US 885 (1980); People v Coddington, 188 Mich App 584, 599; 470 NW2d 478 (1991).

As noted previously, Titus, the only witness to the murder itself, testified that Mustin did not participate in the beating, but only chased the victim down with the help of Chatman. Mustin then stood by as Houston and Chatman beat the victim to death. Nonetheless, we believe that the prosecutor's proofs allowed a rational trier of fact to conclude beyond a reasonable doubt that Mustin was guilty of second-degree murder on an aiding and abetting theory.

A person who procures, counsels, aids or abets in the commission of an offense may be tried and convicted as if he had directly committed the offense. MCL 767.39; MSA 28.979. The phrase "aiding and abetting" describes all forms of assistance rendered to the perpetrator of the crime and comprehends all words or deeds which may support, encourage or incite the commission of a crime. People v Palmer, 392 Mich 370, 378; 220 NW2d 393 (1974); People v Vicuna, 141 Mich App 486, 495; 367 NW2d 887 (1985). A defendant would be guilty of aiding and abetting a crime upon proof that (1) the substantive criminal offense was committed by the defendant or by another, (2) the defendant performed acts or gave encouragement which aided or assisted the commission of the crime, and (3) the defendant intended the commission of the crime or had knowledge

that the principal intended its commission at the time of giving aid or encouragement. People v Rockwell, 188 Mich App 405, 411; 470 NW2d 673 (1991); People v Beard, 171 Mich App 538, 541-542; 431 NW2d 232 (1988). Mere presence, even with knowledge that an offense is about to be committed, is not enough to make one an aider or abettor. Vicuna, supra.

Mustin was tried for aiding or abetting second-degree murder. Second-degree murder is committed if the actor entertains one of three possible intents: the intent to kill, the intent to inflict great bodily harm, or the intent to create a very high risk of death or great bodily harm with the knowledge that death or great bodily harm will probably result. People v Dykhouse, 418 Mich 488, 495; 345 NW2d 150 (1984); People v Flowers, 191 Mich App 169, 176; ___ NW2d ___ (1991). Intent is a question of fact to be inferred from the circumstances by the trier of facts. Flowers, supra, at 178.

Our review of the record shows that the jury could have easily inferred from the evidence that Mustin and his colleagues were spoiling for a fight from early on. The evidence established more than Mustin's "mere presence" at the murder scene. Mustin performed an act that assisted in the commission of the offense -- chasing down and capturing the victim with Chatman, thereby allowing Chatman and Houston to kill the victim. This act was performed after Houston assaulted Titus in Mustin's presence. When the prosecutor's evidence is viewed as a whole, the trier of fact could have reasonably concluded either (1) that Mustin aided the commission of the offense and that Mustin himself intended that great bodily harm be inflicted on the victim, one of the

> three intents that will support a conviction for second-degree murder, or (2) that Mustin knew at the time he aided the offense that Chatman and Houston intended to inflict great bodily harm on the victim. The trial court properly denied Mustin's motion for a directed verdict.
> (R 36; pp 2-3)

On October 26, 1992, Petitioner's counsel filed an application for leave to appeal in the Michigan Supreme Court, People v Mustin, Michigan Supreme Court file number 95120, which raised the following argument:

> SHOULD THE COURT OF APPEALS BE PERMITTED TO DISREGARD FACTS SET FORTH AND ADMITTED INTO EVIDENCE DURING BOTH THE PRELIMINARY EXAMINATION AND TRIAL OF THE CASE, AND SUBSTITUTE ITS FACTS, EVEN IF NOT SUPPORTED BY THE EVIDENCE ADDUCED ON THE RECORDS, EITHER DURING THE PRELIMINARY EXAMINATION OR DURING THE COURT OF TRIAL?
> (R 37 Petitioner's Brief, Statement of Issue)

Petitioner's application was denied in a form order on December 2, 1992. (R 37; p 1)

On January 5, 1993, Petitioner commenced this cause in the District Court by filing a habeas petition and a supporting brief, which concluded:

> There was a total lack of the evidence necessary to sustain the connection (sic) of Eugene James Mustin; for that reason, Petitioner, Eugene James Mustin, must be freed of all charges against him! (R 1, Brief, p 19)

On July 13, 1993, Respondent filed an answer to Petitioner's habeas petition, and inter alia, admitted that Petitioner had exhausted his state court remedies upon his

sufficiency of the evidence claim, and argued that the evidence was sufficient to support Petitioner's conviction of second degree murder. (R 38)

On September 8, 1993, United States Magistrate Judge Paul J. Komives issued a Report and Recommendation in this cause recommending that the District Court deny Petitioner's habeas petition, which provided in pertinent part:

> As noted supra, petitioner's reply brief advances a second supposed ground for relief. Labeled "Motion to Suppress" (Reply Brief at p. 5), this ground is that the trial court ordered no reference to be made to any alleged vandalism of various cars, yet the prosecutor constantly referred to the allegedly forbidden subject matter. This ground was not advanced by petitioner's counsel in his appeal to the Michigan Court of Appeals and should be deemed unavailable for federal prison review purposes. (R 40; p 17)

Petitioner filed objections to the Report and Recommendation, and Respondent replied to the objection.

On October 18, 1993, the District Court entered an order denying Petitioner's habeas petition, which provides in pertinent part:

> Suffice to say the petition raise a sufficiency of the evidence issue. The magistrate judge's Report and Recommendation discusses the evidence and the inference which the jury could reasonably draw regarding petitioner's intent. The Court adopts the Report and Recommendation as the findings and conclusions of the Court. The petition is DENIED. (R 44)

On January 7, 1994, the District Court entered an Order denying motion for reconsideration, which provides in pertinent part:

> Nothing in the motion papers supports the view that the Court erred in adopting the magistrate judge's analysis of the evidence at trial and the inference which reasonable jurors could draw from it. As stated in the RESPONDENT'S REPLY TO PETITIONER'S OBJECTIONS TO THE MAGISTRATES (sic) REPORT AND RECOMMENDATION, p. 5:
>
> A rational jury could infer that Petitioner assisted the co-defendant in catching Mr. Toureau knowing that the intent of co-defendant was to assault and cause great bodily harm to him.

Petitioner's brief in the Sixth Circuit Court of Appeals contained, in addition to a sufficiency of the evidence argument, the following two arguments:

> II. HARMFUL ERROR WAS COMMITTED BY THE COURT IN PERMITTING THE PEOPLE (PROSECUTOR) TO PREDICATE ARGUMENTS FOR CONVICTION ON ALLEGATIONS THAT THE DEFENDANTS HAD VANDALIZED AUTOMOBILES BELONGING TO THE WHITE YOUTHS WHEN THE BLACK YOUTHS WERE NOT CHARGED WITH VANDALIZING THE AUTOMOBILES.
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> III. PETITIONER'S SIXTH AMENDMENT RIGHTS OF CONFRONTATION AND CROSS EXAMINATION WERE VIOLATED BY THE READING OF THE NON-TESTIFYING CODEFENDANT'S CONFESSION TO THE COURT AND JURY; THE WEAKNESS OR ABSENCE OF OTHER INCULPATING TESTIMONY SUFFICIENT TO CONVICT MADE THE ERROR A HARMFUL ONE.

On January 18, 1995, the Sixth Circuit Court of Appeals issued its decision affirming the district court's judgment dismissing Petitioner's habeas petition, which provides in pertinent part:

> The petitioner, Eugene Mustin, appeals from the district court's judgment denying his petition for issuance of a writ of habeas corpus pursuant to the provisions of 28 USC § 2254. In his petition[1], Mustin raised only one issue, challenging the legal sufficiency of the evidence used to convict him. We have reviewed the record and find no basis on which to disturb the district court's judgment. We therefore affirm.

Petitioner's petition for writ of certiorari contains the arguments that the Sixth Circuit Court of Appeals held were not properly before it for review.

REASONS FOR DENYING THE WRIT

THE PETITION PRESENTS NO IMPORTANT UNSETTLED QUESTION OF FEDERAL LAW AND THE DECISION BELOW DOES NOT CONFLICT WITH DECISIONS OF THIS COURT OR OTHER UNITED STATES COURTS OF APPEALS.

Petitioner does not and cannot establish that this case involves important unsettled questions of federal law or that the decision below conflicts with decisions of this Court or other United States Courts of Appeals. This case merely involves the routine application of settled law to the facts of the case.

[1] In a reply brief filed in district court and in his brief on appeal, the petitioner attempted to raise two additional issues. We conclude that they are not properly before us for review.

PETITIONER'S HABEAS CLAIMS RAISED FOR THE FIRST TIME ON APPEAL WERE NOT PROPERLY BEFORE, AND WERE NOT CONSIDERED BY OR RULED UPON BY, THE SIXTH CIRCUIT COURT OF APPEALS.

Petitioner neither acknowledges, nor challenges the Sixth Circuit Court of Appeals' ruling that his habeas claims concerning the alleged trial court ruling suppressing vandalism evidence and the admission of Chatman's redacted statement were not properly before the Court for review, and were, therefore, not considered by or ruled upon. Instead, Petitioner merely argues the merits of those claims, which are not properly before the Court. The only issue before the Court is whether those claims were properly before the Sixth Circuit Court of Appeals, and they clearly were not as that Court correctly ruled.

Petitioner's second and third habeas claims on appeal were not presented to the Michigan Court of Appeals and the Michigan Supreme Court as required for Petitioner to present them to the district court in a habeas petition. 28 U.S.C. 2254(b); Picard v. Connor, 404 U.S. 270, 275-278 (1971). Petitioner's third habeas claim on appeal, which involved the admission of Chatman's redacted statement that did not mention Petitioner, was not presented in any fashion to the district court. Petitioner's second habeas claim on appeal, which involved Petitioner's alleged trial court order suppressing evidence of the vandalism to the basketball players' cars, was held by the district court's adoption of the Magistrate Judge's Report and Recommendation to be unexhausted and unavailable for federal habeas review purposes. (R 40, p 17) Thus, Petitioner's second and third habeas claims on appeal were not considered on the merits and ruled upon by the District Court, but were raised for the first time on appeal. The Sixth Circuit Court of Appeals, therefore, correctly held that the claims were not properly before the Court for review and did not review those claims. Singleton v. Wulff, 428 U.S. 106, 120-121 (1976); Brown v. Marshall, 704 F.2d 333, 334 (6th Cir. 1983), cert. den. 464 U.S. 835 (1983).

SUFFICIENT EVIDENCE WAS PRESENTED AT PETITIONER'S JURY TRIAL TO SUPPORT HIS CONVICTION OF SECOND DEGREE MURDER.

A petitioner raising a claim of insufficient evidence is not entitled to habeas relief unless it is determined that upon the record evidence adduced at the trial, no rational trier of fact could have found guilt beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 324 (1979); Brown v. Davis, 752 F.2d 1142, 1144 (6th Cir. 1985); Fuller v. Anderson, 662 F.2d 420 (6th Cir. 1981), cert. den. 455 U.S. 1028 (1982). A habeas court must review the evidence in the light most favorable to the prosecutor to determine that each substantive element of the crime as defined by state law was established beyond a reasonable doubt. Jackson, supra, 443 U.S. at 319, 324.

Petitioner was charged with second degree murder, in violation of M.C.L. 750.317; M.S.A. 28.549, which provides:

> All other kinds of murder shall be murder of the second [2nd] degree, and shall be punished by imprisonment in the state prison for life, or any term of years, in the discretion of the court trying the same.

M.C.L. 767.39; M.S.A. 28.979, which abolished the distinction between a principal perpetrator and an accessory, provides:

> Every person concerned in the commission of an offense, whether he directly commits the act constituting the offense or procures, counsel, aids, or abets in its commission may hereafter be prosecuted, indicted, tried and on conviction shall be punished as if he had directly committed such offense.

The Michigan Court of Appeals in People v. Smith, 148 Mich. App. 16, 21; 384 NW.2d 68 (1985), held:

> The elements of second-degree murder are (1) that a death occurred, (2) that it was caused by the defendant, (3) that the killing was done with malice, and (4) without justification or excuse. People v Nash, 110 Mich App 428, 452; 313 NW2d 307 (1981), aff'd in part 418 Mich 196; 341 NW2d 439 (1983); CJI 16:3:01.

In People v. Flowers, 191 Mich. App. 169, 176-177; 477 NW.2d 473 (1991), lv. den. 439 Mich. 953 (1992), the Michigan Court of Appeals discussed second degree murder and the malice requirement:

> Murder at common law is now known under our statutory scheme as the crime of second-degree murder. MCL 750.317; MSA 28.549. Second-degree murder is committed only if the actor entertains one of three possible intents: the intent to kill, the intent to inflict great bodily harm, or the intent to create a very high risk of death or great bodily harm with the knowledge that death or great bodily harm will probably result. People v Dykhouse, 418 Mich 488, 495; 345 NW2d 150 (1984). In contrast, the statutory crime of first-degree premeditated murder is committed only if the defendant entertains the intent to kill, which must be deliberate and premeditated. Id.
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> The facts and circumstances of a killing may give rise to an inference of malice, but malice can never be established as a matter of law by proof of those facts and circumstances. It is for the jury to determine whether the element of malice can be inferred from all the evidence. People v Richardson, 409 Mich 126, 144; 293 NW2d 332 (1980). A jury can properly infer malice from evidence that a defendant intentionally set in motion a

> force likely to cause death or great bodily harm. If the jury concludes that malice existed, it can find murder . . .

The Michigan Court of Appeals in affirming Petitioner's conviction, held the elements for convicting a person of aiding and abetting a crime are:

> A defendant would be guilty of aiding and abetting a crime upon proof that (1) the substantive criminal offense was committed by the defendant or by another, (2) the defendant performed acts or gave encouragement which aided or assisted the commission of the crime, and (3) the Defendant intended the commission of the crime or had knowledge that the principal intended its commission at the time of giving aid or encouragement. People v Rockwell, 188 Mich App 405, 411; 470 NW2d 673 (1991); People v Beard, 171 Mich App 538, 541-542; 431 NW2d 232 (1988). Mere presence, even with knowledge that an offense is about to be committed, is not enough to make one an aider or abettor. Vicuna, supra.

There is sufficient evidence in this case that a rational trier of fact could have relied upon and drawn inferences from to find Petitioner guilty of second degree murder as a principal perpetrator or as an accessory, M.C.L. 767.39; M.S.A. 28.979.

Petitioner and his companions walked back towards the crime scene, after Paluzzio threw his bolt cutter at Petitioner's mother's car. Houston attempted to round up help for the anticipated confrontation. Petitioner and Chatman continued without Houston, and Houston rejoined them, when he heard a yell. Brian Toureau was on the Service Drive, without anything in his hands, when Jason Titus rode by him on his bicycle. Houston assaulted Titus, without warning or provocation, and forcibly took Titus' bicycle chain and lock. Petitioner and Chatman, one of whom was carrying the bumper jack, chased down Brian

Toureau, and trapped him against a six-foot high cyclone fence, where Chatman dragged Toureau to the ground and started beating him. Houston joined Petitioner and Chatman with Titus' bicycle chain and lock, and both Houston and Chatman beat Toureau with the chain and lock. Toureau was savagely beaten. His right shin bone was broken from a blow to the back of his leg, which left the imprint pattern of a chain, and his broken shin bone was sticking through the skin at the front of his leg. The back of his skull had a gaping three-inch laceration and the underlying skull was smashed inward. Toureau died from his head injury. Toureau's body was laying next to the cyclone fence with the bumper jack by his head. The chain and lock were later found in a sewer. When Petitioner was apprehended by the police, his shirt was torn and hanging open, he had a scrape on his side, he was disheveled and had a blister and puncture wound on his left hand.

The evidence clearly establishes beyond a reasonable doubt that on September 4, 1988, in Macomb Gardens Park, Macomb County, Michigan: 1) Brian Toureau died from a head injury by the six-foot high cyclone fence surrounding the park with a bumper jack near his head; 2) that Brian Toureau's death was caused by Petitioner's companions -- Houston, who was observed by Titus beating Toureau with the chain and lock he forcibly took from Titus and carried to the area were Petitioner and Chatman had Toureau against the cyclone fence, and Chatman, who admitted beating Brian Toureau with a chain and lock and was also observed beating Toureau by Titus; and, 3) that Brian Toureau's death killing was without justification or excuse.

The jury could properly infer malice from the evidence in convicting Houston and Chatman of second degree murder. The jury could also properly infer malice from the evidence to convict Petitioner of second degree murder as a principal perpetrator, or that Petitioner aided or assisted the second degree murder of Brian Toureau.

Petitioner was not a mere bystander. The jury, and any reasonable trier of fact, could have concluded: 1) that Petitioner was an active participant and returned to the area where the basketball players' cars were parked intending to

inflict great bodily harm for the damage to his mother's car; 2) that Petitioner and Chatman, one of whom was carrying the bumper jack later found next to Brian Toureau's head, chased down Brian Toureau, intending to inflict great bodily harm with the jack; 3) that Petitioner, who was disheveled, with a bloody torn shirt, a scrape on his side and a blister and puncture wound on his palm when later apprehended, actively trapped Brian Toureau against the fence to inflict or assist in the infliction of great bodily harm on Brian Toureau; and, 4) that Petitioner intended to inflict great bodily harm on Brian Toureau or had knowledge that Houston and Chatman intended to inflict great bodily harm on Brian Toureau, when he aided and assisted them.

The evidence, when viewed in the light most favorable to the prosecution, is clearly sufficient for a reasonable trier of fact to have found that the essential elements of second degree murder had been established beyond a reasonable doubt in convicting Petitioner of that crime as Petitioner's jury, the Michigan Court of Appeals, the district court, and the Sixth Circuit Court of Appeals found.

RELIEF SOUGHT

WHEREFORE, Respondent urges this Court to deny the petition for writ of certiorari.

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